

Protection of Plant Varieties and Farmers' Rights Bill 2000

B.K. KEAYLA



Centre for Study of Global Trade
System and Development

A-388, Sarita Vihar, New Delhi 110 044 (India)

Where the mind is without fear
 and the head is held high;
 where knowledge is free;
 Where the world has not been broken up
 into fragments by narrow domestic walls;
 Where the words come out from the depth of truth;
 Where tireless striving stretches its arms
 towards perfection;
 Where the clear stream of reason
 has not lost its way into the dreary desert sand
 of dead habit;
 Where the mind is led forward
 by thee into ever-widening thought and action
 Into that heaven of freedom,
 my Father, let my country awake.

~ Rabindranath Tagore

We do not believe in a rigid autarchy, but we do want
 to make India self-sufficient in regard to her needs as
 far as this is possible. We want to develop
 international trade, importing articles which we
 cannot easily produce and exporting such articles as
 the rest of the world wants from us. We do not
 propose to submit to the economic imperialism of any
 other country or to impose our own on others. We
 believe that the nations of the world can co-operate
 together in building a world economy which is
 advantageous for all and in this work we shall gladly
 co-operate. But this economy cannot be based on the
 individual profit motive, nor can it subsist within the
 framework of imperialist system. It means a new
 world order, both politically and economically, and
 free nations co-operating together for their own as
 well as the larger good.

~ Jawaharlal Nehru
 October 4, 1940

First Edition December 2000
 Second Edition February 2001

Published by
 Centre for Study of Global Trade
 System & Development
 A-388, Sarita Vihar, New Delhi 110 044.
 Telefax: 694-7403 & 681-3311
 Fax-694-2222

Typeset and printed at Rajkamal Electric Press,
 B-35/9 G T Karnal Road, Delhi 110 033

THE PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS BILL, 2000 : SOME CRITICAL ISSUES.

B.K.Keayla*

Introduction

The Government of India introduced eight IPR Bills in Parliament during the winter session of December, 1999. These Bills related to Patents, Plant Varieties, Copyright, Designs, Geographical Indications, Information Technology, Semi - conductor Integrated Circuits Layout and Trade Marks. The need for introduction of these Bills in Parliament arose from Article 65(2) of the TRIPS Agreement of WTO. The transitional arrangements provided in this Article enjoins upon the developing country members to apply the provisions of the TRIPS Agreement within five years following the date of entry into force of the WTO Agreement. The date of application of the TRIPS Agreement was thus assumed as January 1, 2000 for the developing countries. Some of the Bills have already been passed by Parliament and have received the Presidential assent also. However two major Bills viz. the Patents (Second Amendment) Bill and the Protection of Plant Varieties and Farmers' Rights Bill were referred to two separate joint committees of Houses of Parliament. The committee on Patents (Second Amendment) Bill 1999 may be submitting its report during the Budget Session of Parliament. The other Committee on the Protection of Plant Varieties and Farmers' Rights Bill submitted its report and a redrafted Bill to both the Houses of Parliament on August 25, 2000. This redrafted Bill has now to be debated in Parliament. Both the Bills are extremely important for the future growth of the Industrial sector and the Agriculture sector respectively. This paper deals with some critical issues in the redrafted Bill on Protection of Plant Varieties and Farmers' Rights.

* B. K. Keayla is Convenor of National Working Group on Patent Laws. He retired from the Central Government as Commissioner of Payments. E.Mail: wgkeayla@del6.vsnl.net.in

Hasty action

Article 27(3)(b) of the TRIPS Agreement provides for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. It is also provided that the provisions of sub-paragraph 27(3)(b) shall be reviewed in four years after the date of entry into force of the WTO agreement (i.e. during 1999). This mandated review process was initiated in the WTO during 1999 and the same has yet to be concluded. There are important fundamental issues about the patenting of life form that deserve broad consultations both with society and among relevant Ministries in the national governments. Thus it might take longer time to conclude consultations.

Many African countries led by Kenya have submitted a detailed Memorandum to the WTO raising serious problems and objections in regard to the protection of plant varieties. They have desired a substantive approach to the review contemplated under Article 27(3)(b). Further some developing countries have also raised problems of implementation and the need for extending the transitional period. These issues are receiving consideration of the General Council of the WTO. There is no decision as yet on these issues.

The reading of Article 65(4) of the TRIPs Agreement further gives unambiguous indication that in so far as the framing of laws for the protection of plant varieties which is an area of technology not so protected in India is concerned there is transitional period of ten years available for evacting the relevant law. Thus all issues relating to protection of plant varieties are in a flux.. The conclusion one draws from all these factors is that the Government is in a haste to enact the legislation for the protection of plant varieties. The Government seems to be under pressure from Indian agricultural scientists to enact this legislation so that they are able to protect their research achievements. However, there is no consolidated data available about the research achievements of the Indian scientists on *new* plant varieties qualifying exclusive rights and protection.

Anyhow since the Government has already introduced the Bill in Parliament the above are all academic issues which will not now receive the desired attention of the Government. Even the Committee of the Houses of Parliament on this Bill which was apprised of these issues ignored them in their report. Parliament might like to give due consideration to them when the Bill comes up for consideration by both the Houses of Parliament. Coming to the proposed provisions of the revised

Bill, there are also certain fundamental issues which need to be debated in depth.

Scope of protection

In the Bill the fore-most issue relates to the scope and coverage of the Bill. Section 14 of the Bill on application for registration provides 'for registration of *any* variety—

- (a) of such genera and species as specified under sub-section (2) of Section 29 i.e. as notified by the Central Government in the official gazette ; or
- (b) which is an extant variety; or
- (c) which is a farmers' variety'.

Further Section 23(6) provides that the 'rights of the breeder of a variety contained in Section 28 (relating to *exclusive rights* conferred on the breeder) shall apply to the breeder of essentially derived variety'.

Then Section 15(2) provides for registration of extant variety even if it did not conform to the criteria of *novelty*, i.e. it may conform only to the criteria of distinctiveness, uniformity and stability.

There are two major issues which need serious consideration. The TRIPs Agreement provides for protection of plant varieties which means *new* plant varieties and not the derived variety or the extant variety. Judging from the novelty angle both derived and extant varieties would not qualify for any exclusive rights which are supposed to be provided to the breeder on the *new* plant varieties on registration under Section 28(1). The exclusive rights as provided under Section 28(1) to produce, sell, market, distribute, import or export the variety should be allowed only when the criteria of novelty, distinctiveness, uniformity and stability as specified in Section 15(1) are satisfied.

The derived variety may be considered for second protection (patent) only when it involves an important technical advancement of considerable economic significance in relation to the initial variety and that too if that variety is still enjoying exclusive right under Section 28(1). The right available to the derived variety should also be co - terminus with the term of the initial variety.

The other aspect relates to the number of genera or species which ought to be covered to start with on the enactment of the law. UPOV Conventions 1978 and 1991 permit new members to start with protection of a limited number of genera or species viz. five or fifteen respec-

tively. We should also aim at protecting not more than ten genera or species to start with. These ten plants should also be listed suitable in the enacted law and not left to the government to notify. Subsequently government could exercise its rights to extend the law to other plants and that too in stages over a period of 10 - 15 years.

Our choice should be that all plant varieties related to food security viz. food grains, vegetables and fruits are placed in the exempt categories for the time being. Our selection for protection could be limited to flowers, ornamental plants, spices, tea, coffee, rubber, etc. In suggesting limited coverage an important compulsion also is that we are not yet ready with the codified data of all existing plant varieties. In the absence of this we can falter in conferring exclusive rights on claims for such so called new varieties which are already in public domain. Further as stated earlier only *new* plant varieties should be covered and there should be no provision for conferring exclusive rights for *derived* and *extant* varieties. The freedom of *sui generis* must be exercised by our Government/Parliament to limit the scope of coverage as far as possible. Further let the international scenario crystallize after the mandated review and then the extended scope could be considered.

Farmers Rights

The redrafted Bill provides for Farmers rights under Section 39(1) Sub-section (iv) which reads as follows :

39(1)(iv) “a farmer shall be deemed to be entitled to save, use, sow, resow, exchange, share or sell his farm produce including seed of a variety protected under this Act in the same manner as he was entitled before the coming into force of this Act ;

Provided that the farmer shall not be entitled to sell branded seed of a variety protected under this Act”.

The above provision clearly restricts the right of the farmer as he will not be able to sell the protected variety which the right holder will be selling under his registered brand name. The Committee of Houses of Parliament even did not provide for sale of surplus seeds of protected variety by farmers by identifying the same by the distinct denomination assigned under Section 17 of the Bill. The identification of such seeds

atleast by their assigned denomination which is not registered under the Trade Mark Act 1999 is important at the time of sale in the market. No farmer will buy any seed which has not been identified by some name or the brand name.

Under Sub-section (iv) of Section 39(1), the following Explanation has also been provided :

Explanation : (under Section 39 (1)(iv)

“For the purpose of clause (iv) branded seed means any seed put in a package or any other container and labeled in a manner indicating that such seed is of a variety protected under this Act”.

This explanation further goes against the interest of the farmers and the sale of surplus protected seed will remain a serious problem for the farmers.

Incidentally, at the international level farmers' rights have only been acknowledged in a non-binding resolution of the FAO Conference known as “the International Undertaking on Plant Genetic Resources”. No binding treaty has yet recognised these rights and still there is disagreement on the nature of specific rights. The question as to whether the farmers' rights should be specifically provided in the proposed legislation in India which as such under the TRIPs Agreement is meant only for regulating the exclusive rights granted to the breeders on their *new* plant varieties.

In view of the position explained the only relevant aspect which needs to be amplified in the Bill is that ‘the farmers shall continue to enjoy rights and privileges enjoyed by them as hitherto i.e. prior to the enactment of this legislation’. It would be thus within the farmers rights to save seeds from his new harvest, exchange seeds with other farmers and sell seeds surplus to his requirement which need to be disposed off in the market under the registered distinct denomination. Legally, the farmer cannot use the same brand name as that of the breeder for sale of his surplus produce. However, there should not be any difficulty as stated above in labeling the surplus seeds by the distinct denomination given under Section 17 to the variety.

Benefit Sharing

The Bill provides for benefit sharing for the tribals or rural families, or individual farmers, or local communities if they are able to establish the linkage of the new protected variety of a right - holder to the variety developed by them. This is a very good provision and the long pending

need to remunerate the tribals etc. for their past achievements would be accomplished. The concerned Organisation will have to act fast and in a judicious manner to do justice to this laudable provision.

In case any farmer wants to embark upon commercial activity of a new protected variety, he will have to obtain compulsory licence for such an activity. This act will fall outside the normal rights of the farmers.

National Gene Fund

Another aspect of the Bill which needs to be considered relates to the creation of a National Gene Fund. Since the Biological Diversity Bill 2000 also provides for almost a similar Funds, the issue to be considered is whether there should be two separate funds with thin line of their application. It may be desirable not to provide for the proposed Fund in this Bill. Under the Biological Diversity Bill there are multiplicity of Funds at national level, state levels and local levels. This issue needs deeper thinking. The Bill should have only the regulatory functions for the protection of plant varieties.

Organisational set up

The Bill provides for a statutory authority having perpetual succession and a common seal to manage the regulatory system. It will consists of a Chairman and 15 other members including a large number of ex-official members. The issue to be considered is whether there should be a statutory body or a Government functionary for regulating the system. For the Industrial patents the Patents Act, 1970 provides for a Controller General of Patents, Designs and Trade Marks. Since the scope of coverage for protection of plant varieties would be a limited one, it is considered desirable to follow a similar organisational set up as is in operation for the industrial patents. A high powered Registrar General of Plant Varieties directly appointed by the Government after selection by associating Union Public Service Commission would be the right choice. Further the ex-officio members of the authority would not be directly accountable for any questionable act, if any.

Compulsory licence

Another important issue relates to the compulsory licence system as

provided in Chapter VII of the redrafted Bill. The compulsory licence system will be to safe-guard the public interest as stated in Section 47 of the Bill. The question of determining the duration of the compulsory licence by the Authority as stipulated in Section 50 should not arise. Such licences are issued to be co-terminus with the term available to the right holders. Further it is provided that the grant of compulsory licence can be subjected to appeal refer Sec.56(1)(d). Since there are long delays in settling appeals in courts or tribunal in practice such licences would remain non - operational and on papers for a long period. This provision of appeals would not thus serve the public interest of immediate availability of protected seed variety at reasonable prices through other sources.

In this context it would also be desirable to consider the system of granting of "licensing of right" which could particularly be extended to the farmers and the agriculture universities. Under the scheme legal right would be available to them for grant of licence provided they have made an attempt to obtain the licence from the right holder on a reasonable terms and conditions (ceiling of which should also be specified in the Bill) and their efforts have not been successful within a reasonable period, say 150 days. Thus it would be desirable to provide for in the Bill some parameters of royalty for compensating the right holder and the period of waiting for a response. The spirit of this provision could be even provided under the compulsory licence system.

Implication of the system

The extension of intellectual property right to plant variety has obvious implications. Presently, the seeds of new varieties protected abroad are being freely imported and sold in the market by the seed companies as we have no laws for protection of plant varieties. When the IPR system becomes applicable in our country, the right holders would make available the protected seeds at monopolistic prices. New seeds imported from abroad are already expensive and when monopolies get established they will become even more costlier. Importers presently are freely multiplying such seeds and there is no problem as such about their availability. Thus under the IPR system for plant variety we shall be facing both the problems of high prices and not so easy availability.

Another aspect relates to the investment in research and development. Multinational corporations in the seed business have enormous funds available to them for research purposes. They would always have

an edge in introducing new seeds in our country. As against this, in India the public sector efforts are facing financial crunch for investing in research and development. The private sector at present is hardly involved in the research efforts in the development of new seeds. In any case they would never be able to match with the potential of multinational corporations. IPR system for protection of new plant varieties would mainly lead the Agriculture sector dependence on multinational corporations.

Conclusion

With the adoption of above suggestions, the Redrafted Bill for Protection of Plant Varieties and Farmers' Rights would become a simplified legislation devoid of problems of application and operation. India has no experience of plant variety protection regulatory system. A simplified system would be in the interest of all concerned. Later it would also be possible to incorporate any other provision which might help in the implementation of the system after the WTO has reviewed the relevant provisions of the TRIPS agreement and also the problems of implementation posed by the Developing Countries which are under consideration of the General Council of WTO have been sorted out. Further in the meantime Government should expedite the completion of codification of various plant varieties.

Lastly, the implications of joining the UPOV Convention should be considered as after joining this convention, it would not be possible to protect the rights and privileges of the farmers and for that reason there should be no further GENUFLECTION.

Summing up of Issues

- (a) The outcome of review of Article 27(3)(b) of TRIPS by WTO should be awaited before enacting the law in our country.
- (b) The scope of exclusive rights protection should be limited to 10 plant genera or species to start with.
- (c) Exclusive rights should be given only on such varieties which conform to the criteria of novelty, distinctiveness and sustainability. There should be no compromise in the criteria for giving exclusive rights to extant, derived and farmer varieties.
- (d) Farmers should be totally exempt from IPR system. They should have the right to sell the surplus seeds by labelling them by the registered distinct denomination of that variety.

- (e) National Gene Fund should be reconsidered keeping in view the multiplicity of funds proposed in Biological Diversity Bill 2000.
- (f) The need for statutory authority should be reconsidered for regulatory functions which should be performed by a Government functionary. A high powered Registrar General of Plant Varieties should suffice.
- (g) Compulsory licences should be co-terminus with the term available to the right holders. Grant of compulsory licence should not be appealable. The right course would be to provide for legal right through the system of 'licensing of right'.

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